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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1978

No. 78-1002

KERRY M. GOUGH, Trustee in Bankruptcy of LOUIS ROSEN, dba WALNUT CREEK FURNITURE,
Petitioner,

vs.

ROSSMOOR CORPORATION and CRESTMARK CARPET AND DRAPERY COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondents Rossmoor Corporation and Crestmark Carpet and Drapery Company respectfully request that this Court deny the petition for a

writ of certiorari to review the decision of the United States Court of Appeals in this action dated August 9, 1978.

Since the descriptions of the Opinions Below and of the Statutes Involved which are set forth in the Petition are adequate, these items will be omitted from this brief. Respondents wish to advise the court, however, that the opinion of the court below (Petition, Appendix A) has now been officially reported as follows: Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978).

QUESTIONS PRESENTED

Petitioner's statement of the Questions Presented is tendentious and misleading. It is accurate only to the extent that it may serve to apprise the court that the record in this lengthy proceeding is burdened with so many unique and trivial factual and procedural complexities as to render it a singularly unsuitable subject for the Court's exercise of its certiorari jurisdiction. The questions that would actually be presented if the Court were to decide, nevertheless, to hear this case are the questions that were presented to the court of appeals in respondents' opening brief in that court, which were the following:

1. Whether Section 1 of the Sherman Act applies to an alleged "conspiracy" among (1) a corporation engaged in building and developing

a cooperative housing community, (2) a wholly owned subsidiary of the developer engaged in selling carpets and draperies to prospective purchasers of housing and (3) a non-profit corporation established by the developer for the purposes of conducting sales of the cooperative housing and managing the community facilities.

2. Whether, assuming that such a "conspiracy" is cognizable under Section 1, a prima facie case of the existence of the alleged conspiracy is established by evidence which shows only that the alleged conspirators had extensive contacts with one another on a variety of subjects, not including the subject of the alleged conspiracy, and commonly cooperated with one another in furthering the interests of the overall enterprise.

3. Whether, assuming that such a "conspiracy" is cognizable under section 1 and has been proved by competent evidence, the conspiracy violates the Sherman Act where it consists solely of an agreement by the non-profit sales corporation, which is also the lessor of the space in which the wholly owned subsidiary conducts its carpet and drapery sales, to refrain from advertising the wares of competing sellers of carpets in the community's "house" newspaper, and where there is no evidence of monopoly power or of the nature of the relevant market.

4. Whether a jury may be allowed to assess damages allegedly arising from a conspiracy to injure the plaintiff's carpet business where the plaintiff's only estimate of such damages is based upon (1) an assumption that the plaintiff would have earned future profits in an annual amount several times larger than the average annual profits actually earned by the plaintiff in prior years; (2) use of the single month in which the plaintiff experienced his highest sales volume as the base period for calculating future sales; (3) factual assumptions directly contradicted in several important respects by undisputed evidence in the record; (4) an assumption that all sales of carpets to residents of a housing community were attributable to advertising in a single newspaper which was only one among several newspapers received by the residents and utilized by the plaintiff for advertising his merchandise; and (5) calculation of the value of the good will of the plaintiff's business by a method which is admitted to have been invented by the plaintiff's expert witness and to violate generally accepted accounting principles in several respects.

5. Whether the following errors in the trial court's rulings on the admissibility of evidence require that its judgment be set aside: (1) admission into evidence of hearsay statements of alleged co-conspirators and other third parties

without an adequate foundation; and (2) admission of purported estimates of the plaintiff's damages which are illogical, contrary to generally accepted accounting principles and based upon factual assumptions that are contradicted by undisputed record evidence.

In addition, if the Court were to review the case, respondents would present the following further question, which they were unable to bring before this Court following the first appeal in this action because the remand for "further proceedings" following that appeal deprived the court of appeals' judgment of the requisite finality.

6. Whether the effect on interstate commerce requisite to a finding of violation of the Sherman Act is established where it is undisputed that neither the plaintiff nor the defendants made any interstate sales of the commodity in question and that even the plaintiff's wholesale purchases of that commodity were made entirely from in-state wholesalers.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is similarly selective, argumentative and, in some instances, less than candid. Among other things, it relies in part on evidence that was stricken from the record by the district court (Petition, pp. 11-12;

see RT 535-37), intimates the existence of all manner of newly invented claims which were never in fact presented to the jury or the courts below (Petition, pp. 11-12; see Petition, Appendix L) and attempts to manufacture "concessions" by respondents on various issues by quoting statements that in turn consist merely of descriptions of petitioner's own arguments (Petition, p. 20; see Appellee's Brief in Gough v. Rossmoor Corp., 487 F.2d 373 (9th Cir. 1973), page 4). Respondents are unable to provide a properly detailed refutation of each of the numerous inaccuracies and omissions in petitioner's Statement of the Case without unduly lengthening this brief. The only practicable way of dealing with the problem is simply to ignore the petitioner's statement and to attempt to balance the picture by providing an independent summary of the essential features of this litigation.

I. The Parties

The original plaintiff in this case was Louis Rosen (CT 1). In 1954, he opened a retail carpet store in Walnut Creek, California, a suburb of San Francisco (RT 583). He operated this business continuously at various locations in that city for the ensuing thirteen years, earning an average annual income (without any deduction for an owner's salary) of approximately $13,000 during the last five of those years (RT 583-86, 704-7). In 1967,

two years after the events that are the subject of this controversy and one year after the commencement of this action, he closed this business and sold his inventory (RT 617, 788). Thereafter he engaged in a variety of other enterprises in unrelated fields until, as a result of a business failure in one of these separate ventures, he was adjudicated bankrupt in 1971 during the pendency of the first appeal in this action (CT 240; RT 674). His trustee in bankruptcy has since prosecuted this claim (CT 240).

The defendants and respondents Rossmoor and Crestmark and their alleged co-conspirator, the Leisure World Foundation, are a group of corporations established by developer Ross Cortese to promote the development and sale of cooperative housing in retirement communities in various parts of the country, each of which is known as Rossmoor Leisure World (see RT 361-68, 483-90). The interrelationships and functions of these different entities are quite complex, having been designed to take account of various intricate tax considerations and FHA regulations (see RT 332, 361-68, 398, 413-16, 480-90, 566-69, 960, 1048). Basically, however, Rossmoor has acted as the purchaser of the land and as the construction contractor, while the Foundation has arranged the financing for the projects and handled all sales and promotional functions (RT 473, 484-92). Crestmark is a

separate subsidiary of Rossmoor established for the sole purpose of selling carpets and draperies to prospective purchasers of housing, a function formerly carried out by the Foundation itself (RT 945-49, 952-55). The Leisure World project at Walnut Creek, which was the third of the Leisure World communities to be developed, opened its first units for occupancy in October 1964, only a few months before the events alleged in plaintiff's complaint (RT 457-58). Crestmark began its carpet sales at this site in January, 1965, occupying a section of the Foundation's administration building under a lease from the Foundation giving it the exclusive right to sell carpets and draperies at that site (RT 72-73, 75, 970-71).

II. Petitioner's Claim and the Evidence Presented in Support Thereof at the Trial

The most striking feature of this case is its extraordinary duration. The case is now entering its thirteenth year and petitioner is here attempting to persuade this Court to prolong it further. In part, this feature of the case is accounted for by the peculiar form of the initial jury verdict and the additional appellate proceedings necessitated by the district court's misinterpretation of the court of appeals' mandate following the first appeal. It is also apparent, however, that much of the difficulty has stemmed from the fact that

petitioner's antitrust claim has exhibited so many different legal flaws that it has been very difficult for the lower courts to keep them all in view at the same time. This pitfall may best be avoided here by organizing the remaining discussion of the pertinent facts and of the proceedings below in accordance with the various legal problems to which they relate. Although this procedure will necessitate some violation of the normal rigid separation between factual statement and legal argument, it is believed warranted in this instance by the risk that the Court might otherwise become entrapped in the numerous layers of obscuring detail with which this case has become encrusted during its seemingly interminable career in the lower courts.

Although the petition contains all sorts of wild accusations of wrongdoing by respondents, ranging from "division of territory" (p. 27) and "price fixing" (p. 28) to "fraud on the United States" (p. 7) and "interfer[ence] with . . . freedom of the press" (p. 39), the only claim actually tried and presented to the jury in this case was that petitioner had been wrongfully denied advertising space in a community newspaper published by the Leisure World Foundation (Petition, Appendix L). This was a weekly newspaper called the Leisure World News, which was devoted to reporting events within the Leisure World community

and generally extolling the advantages of life at Leisure World (RT 307, 332-33, 502-3, 534, 914). It carried advertising for the Rossmoor entities and a few local merchants and was distributed free of charge to the residents of the community and to prospective purchasers of housing (RT 305-8, 334-35, 534, 914).

The Walnut Creek edition of the Leisure World News commenced publication in April, 1965, and plaintiff placed his first advertisement in the paper in June, 1965 (RT 237, 458, 898-99). In late July, however, he was notified that no further ads would be accepted from him (RT 430, 512, 523, 686-87, 696, 900-1, 914-6). This policy was later formalized in a memorandum from the Foundation's head office at the Rossmoor headquarters in Laguna Hills, California, which announced a prohibition against acceptance of advertising from real estate developers other than Rossmoor, carpet retailers other than Crestmark, political candidates, mortuaries and convalescent hospitals (RT 307-8; Plt's. Exh. 51). Even though undisputed evidence later showed that plaintiff and other potential advertisers still had ample access to the residents of Leisure World through several other newspapers, including one weekly shopping news received by virtually every resident in which plaintiff himself had placed 95 per cent of his advertising (RT 514-15, 524, 679-80 688-94), plaintiff was

nevertheless sufficiently miffed by his exclusion from the Leisure World News to file an immediate lawsuit alleging a conspiracy by Rossmoor, Crestmark and the Foundation to monopolize and restrain the retail trade in carpets (CT 1).

From the outset, however, plaintiff's case faced several difficulties. The first of these, which occupied the greatest attention at the trial, was the problem of proving that the exclusion of plaintiff's advertising was actually the result of an agreement or conspiracy among these different corporations. It has been observed that the type of intra-enterprise conspiracy alleged by plaintiff in this case is often "automatically self-proving," because members of the same corporate family commonly confer with one another, in the normal course of business, about all their major decisions, so that evidence of consultation and agreement on any given subject is almost always readily available. Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 84 (9th Cir. 1969), cert. den. 396 U.S. 1062 (1970). See United States v. Citizens & Southern National Bank, 422 U.S. 86, 113-14 (1975). This case, however, proved to be an exception. All of the alleged participants in the alleged conspiracy testified unequivocally that the policy prohibiting carpet advertising by firms other than Crestmark had been implemented

unilaterally by the Foundation on the sole authority of Mr. Olsen, its national vice president, and that no representative of Rossmoor or Crestmark had ever discussed the subject of carpet advertising "in any way, shape or form" with any representative of the Foundation (RT 216-17, 422-25, 430, 442, 447-48, 498, 503-4, 1066, 1078-79, 1081, 1092-93, 1095-1102).

Plaintiff sought to counter these denials and to prove his conspiracy claim in two ways. First, for the apparent purpose of showing motive and opportunity to conspire, he introduced a great variety of evidence, presentation of which consumed most of the ten days of the trial, tending to establish the otherwise rather self-evident facts that the defendants and the Foundation were economically interdependent, that they maintained extensive contacts with one another on a variety of subjects (not including, however, the subject of carpet advertising), and that they tended to act in ways that would promote one another's interests (see Petition, Appendix D). This evidence, much of which is described in the Petition (at pp. 11-12), concerned such miscellaneous items as Mr. Cortese's role in financing the Foundation and hiring its officers (RT 361-62, 473, 960-4, 1052, 1084-85), Rossmoor's participation in formation of the Foundation's sales policies (RT 362-65, 421-22, 560) and Crestmark's

practice of making "spiff" payments to the Foundation's housing salespersons for referrals of carpet purchasers (RT 126, 1031-32).

Secondly, plaintiff offered a single item of direct evidence of conspiracy. This was the testimony of one Mr. Ferris, who had been the Walnut Creek editor of the Leisure World News at the relevant time, to the effect that he had been told by Mr. Nelson, the Foundation's administrator at Walnut Creek, that Ross Cortese had told Mr. Nelson to "tell that guy that runs the paper to get that [Rosen's] ad out" (RT 515-18). Though it was unequivocally contradicted by both Mr. Cortese and Mr. Nelson (RT 423-24, 1078-79, 1081, 1092-93, 1096-97), this testimony was plainly the linchpin of plaintiff's case on this issue. Obviously, however, as both the parties and the trial court recognized from the outset (see RT 265-66, 274-75, 322, 1304-5; Petition, Appendix D-4), this double-hearsay account of the out-of-court declaration of a non-party could not be received in evidence in the absence of independent prima facie proof that a conspiracy existed and that the Foundation was a member of that conspiracy. United States v. Nixon, 418 U.S. 683, 701 n.14 (1974); Glasser v. United States, 315 U.S. 60, 75 (1943); Flintkote Co. v. Lysfjord, 246 F.2d 368, 382, 386-87 (9th Cir. 1957), cert. den. 355 U.S. 835 (1958). Accordingly, while the testimony was provisionally

admitted subject to "connecting up" by sufficient independent evidence of conspiracy, the principal bone of contention throughout the trial was whether the melange of circumstantial proof of corporate interdependence and favoritism described above was independently adequate to support a prima facie case on this issue (see, e.g., RT 260-66, 274-75, 322, 1001, 1007, 1304-5).

The trial court finally resolved this question somewhat ambivalently by agreeing to submit the conspiracy issue - and the hearsay evidence - to the jury, while observing at the same time that "this is a very thin case to go to the jury," and that "if a jury verdict is found for the plaintiff and the proper motions are made, [the verdict] might have to be set aside" (RT 1007). Since, as it turned out, the jury verdict and the initial judgment were in favor of the defendants, the occasion for presenting "the proper motions" did not arise until several years later, at which time, as will be seen below, the trial judge had adopted a somewhat different view.

The second major factual issue that occupied the parties at the trial, and which ultimately produced the verdict in defendants' favor, was whether defendants' conduct had had the requisite impact on interstate commerce. While the situation has admittedly changed somewhat since this Court's

decision in Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738 (1976), and the Ninth Circuit's decision on the first appeal of this case, this issue appeared at the time of trial to present a very imposing obstacle to the plaintiff's recovery. Under the law then in effect in the Ninth Circuit, it seemed quite doubtful that the jurisdictional standard could be satisfied by the evidence presented in this case, which showed that neither plaintiff nor Crestmark sold carpets in interstate commerce, and that even plaintiff's wholesale purchases were wholly intrastate (RT 675-77, 1030). See Sun Valley Disposal Co., Inc. v. Silver State Disposal Co., 420 F.2d 341, 343 (9th Cir. 1969); Page v. Work, 290 F.2d 323, 330 (9th Cir. 1961).

The third element of plaintiff's case, which he inexplicably ignored at the trial and which ultimately engendered his downfall, was proof that the defendants' activities had actually restrained competition in a manner violative of the Sherman Act. Even if it were proved that the Foundation had excluded plaintiff's advertising pursuant to an agreement with Rossmoor or Crestmark, such conduct obviously could not be readily fitted within any of the recognized categories of per se violations, and, indeed, Crestmark's status as the Foundation's lessee indicated that such an agreement would most properly be viewed as

a mere promise by a lessor not to render assistance to his lessee's competitors, a classic example of a kind of behavior requiring proof of actual harm to competition in a relevant market before it can be deemed unlawful. Hecht v. Pro Football, Inc., 570 F.2d 982, 989 (D.C. Cir. 1977), cert. den. 98 S.Ct. 3069 (1977); Savon Gas Stations Number Six v. Shell Oil Co., 309 F.2d 306, 309-11 (4th Cir. 1962); Goldberg v. Tri-States Corp., 126 F.2d 26, 40 (8th Cir. 1942); Note, Antitrust Significance of Covenants Not to Compete, 66 Mich.L.Rev. 503 (1966). See United States v. Addyston Pipe & Steel Co., 85 Fed. 271, 280-81 (6th Cir. 1898), affd. 175 U.S. 211 (1899).

Nevertheless, although his complaint, his trial brief, his jury instructions and his jury argument all indicated he was not unaware of the need for such proof (CT 5, 70, 128; RT 1219, 1307-8), plaintiff adduced no evidence whatsoever on these issues at the trial. Defendants naturally also tended to ignore the issues, having no obligation to supply proof on an element of plaintiff's case. However, they did adduce uncontradicted evidence that Crestmark was an utterly insignificant factor among the group of sellers competing for the retail carpet business in the Walnut Creek area (RT 294-302, 677-79), and that the Leisure World News was likewise a trivial

segment of the advertising media providing access to that business (RT 514-15, 679-80, 688-94). In addition, it was undisputed that there was no tie-in between housing sales and carpet sales at Leisure World, so that residents and prospective residents were perfectly free to purchase their carpets from sources other than Crestmark and that they had actually done so in very substantial numbers (RT 129-30, 1030-34, 1057-59).

Plaintiff's final, and probably most difficult, hurdle was proof of the causation and the amount of his damages. Needless to say, plaintiff faced a very substantial task in attempting to dispel the inherent implausibility of his claim that a retailer who had been earning less than $13,000 a year serving a fast-growing suburban community of over 50,000 people could somehow manage to lose $500,000 (the amount alleged in his complaint), or even $41,000 (the amount of the jury verdict), and to be forced to sell his business in two short years because of lack of access to one of the several advertising media being delivered to the 3000 residents of a single new housing project. Respondents will not burden the court with a complete description of the numerous varieties of fallacious speculation that plaintiff was allowed to place before the jury in an effort to accomplish this considerable feat, which included, among other things, damage calcu-

lations based on profit rates four times larger than the plaintiff's historical profit rate (RT 721, 855-56, 1122-23) and estimates of good will prepared by methods invented solely for purposes of this case and admitted by plaintiff's own expert witness to be contrary to any accepted accounting practice (RT 841-46, 1157-59). Suffice it to say that the lack of any competent or credible damage proof came to be characterized, in respondents' subsequent challenges to the jury findings, as "the most glaring deficiency of plaintiff's case" (Opening Brief of Appellants in Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978), page 56).

The foregoing account of the underlying facts of this case is admittedly sketchy and somewhat biased in its organization. It is submitted, however, that it provides the Court with a better view of the essential issues that were actually litigated in the trial court than does the petitioner's disorganized effort to tantalize the Court with a bedazzling array of any and every type of exaggeration which he deems capable of catching the Court's attention.

III. The Jury Verdict and the Subsequent Proceedings

As noted in the Petition, the case was ultimately submitted to the jury by means of special interrogatories, pursuant to which the jury found

(1) that the defendants had conspired to exclude plaintiff from selling carpets at Leisure World and (2) that plaintiff had thereby suffered damages of $40,881, but (3) that the defendants' conduct had had no substantial effect on interstate commerce (Petition, Appendix L). Because of the jury's negative finding on the interstate-commerce issue, the court entered judgment for defendants and thereafter denied plaintiff's motions for judgment n.o.v. and a new trial (Petition, Appendix K). Having thus received a verdict and judgment in their favor, defendants naturally had no need to make any post-judgment motions of their own, and indeed they could not have done so, since Rule 50(b) permits only a motion "to have the verdict and any judgment thereon set aside."

Plaintiff appealed from this judgment, contending that a judgment should have been entered in his favor notwithstanding the jury verdict because the requisite impact on interstate commerce had been established as a matter of law (CT 230). Again, respondents did not, and could not have, prosecuted a cross-appeal at this stage challenging the jury findings on liability and damages, because a cross-appeal is permitted only from a portion of a judgment, not from a mere verdict or findings of a court or jury, and the only judgment theretofore entered had been entirely

respondent's favor. 28 U.S.C. §1291; 9 Moore's Federal Practice 932-40 (2d ed. 1973). Rather, the first opportunity to present these challenges to the jury findings arose when the court of appeals filed its initial opinion, which held that the necessary effect on interstate commerce had indeed been demonstrated, and which accordingly reversed the judgment for defendants and directed entry of judgment for plaintiff. Gough v. Rossmoor Corp., 487 F.2d 373 (9th Cir. 1973) (Petition, Appendix I). At that point, pursuant to the precise procedures prescribed by this Court to govern such situations in Neely v. Martin K. Eby Constr. Co., 386 U.S. 317 (1967), defendants filed a timely petition for rehearing which included specifically entitled motions for a new trial and judgment n.o.v. on the portion of the verdict which had been adverse to them (CT 289). These motions expressly addressed every issue which respondents have since urged as a ground for judgment in their favor in this case, including the absence of any admissible proof of a conspiracy, the lack of any showing of competitive impact or proof of a relevant market and the inadequacy of plaintiff's damage evidence (CT 322-42). In response to the motions, the court of appeals modified its opinion, deleting the direction to enter judgment for plaintiff and substituting a direction to the district court to

conduct "further proceedings" in the case (Petition, Appendix J).

The apparent purpose of this modification of the mandate was to require the district court to provide the intial consideration of defendants' motions for a new trial and judgment n.o.v., which is one of the methods by which a court of appeals is permitted to dispose of such motions under the procedures outlined in Neely, supra. Neely v. Martin K. Eby Constr. Co., supra at 325. See also Iacurci v. Lummus Co., 387 U.S. 86, 88 (1967). The district court, however, misconceived the intent of the mandate and, instead, held that it was forcelosed by the court of appeals' opinion from entertaining defendants' motions (Petition, Appendix G). After assessing attorneys' fees in the amount of $50,000, the district court simply entered a "final" judgment for plaintiff and, when defendants' motions were subsequently filed (CT 386), denied them on this ground without considering their merits (Petition, Appendices F, G, H). Defendants were therefore forced to prosecute a second appeal in order to compel compliance with the first mandate. Gough v. Rossmoor Corp., 533 F.2d 453 (9th Cir. 1976), cert. denied 429 U.S. 857 (1976) (Petition, Appendix E). Remand from this second appeal was delayed when plaintiff filed a petition for certiorari in this court, raising most of the claims of waiver and non-

compliance with Rule 50(b) which he seeks to raise again in this petition. Gough v. Rossmoor Corp., No. 76-3, October Term 1975, petition filed June 18, 1976. The petition was denied on October 4, 1976. 429 U.S. 857. Accordingly, it was not until two years after the filing of defendants' motions and more than six years after the trial that the district court finally addressed the merits of the question whether plaintiff had presented sufficient proof to support the jury verdict on the issues of liability and damages.

In its opinion on the merits of defendants' motions (Petition, Appendix D), the district court dealt only with the question of the sufficiency of the non-hearsay evidence to support the finding of conspiracy. It held that this evidence was indeed sufficient, for the somewhat self-contradictory reasons that (a) the financial interdependence and numerous "interrelationships" among Rossmoor, Crestmark and the Foundation presented the "potential" for conspiracy and (b) the Foundation's decision to assist Crestmark by terminating plaintiff's advertising was against the Foundation's "interests" and hence was unlikely to have been made unilaterally (Id. at pp. 2-4). The challenge to plaintiff's damage proof was disposed of in one sentence (Id. at p. 4), and the argument that plaintiff had failed to show a restraint of

competition in a relevant market, to which defendants had devoted considerable attention in their brief in support of their motions (CT 400-3), was simply ignored. Following an assessment of additional attorneys' fees, the court entered judgment for plaintiff in the total amount of $183,504 (Petition, Appendix C).

On appeal from this judgment, the court of appeals again reversed. Finding it necessary only to deal with the issues of restraint of competition and relevant market, the court held that plaintiff had failed to submit adequate proof on these issues to support the judgment. Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978) (Petition, Appendix A). Plaintiff's petition for rehearing and rehearing en banc was denied (Petition, Appendix B). In addition, in a separate order, the court also denied the motion for a new trial which plaintiff had included in his petition for rehearing pursuant to the procedures mandated in Neely, supra (Order dated November 15, 1978, in Gough v. Rossmoor Corp., 9th Cir., No. 77-2047). Thus, if and when this Court denies this petition, nothing will remain for the courts below but the clerical task of entering judgment for defendants, and these lengthy proceedings will at last have reached their final end.

REASONS FOR DENYING THE WRIT

There are two principal reasons why this

Court should decline to review this case. First, the decision of the court of appeals is an altogether routine application of established antitrust doctrine, specifically sanctioned by past decisions of this Court and virtually identical in its reasoning and its result to numerous other holdings of the courts of appeals, and hence presents no novel or important issue which would warrant this Court's attention. Second, as the foregoing review of the facts and prior proceedings strongly suggests, the record in this case presents so many other grounds for affirmance of the judgment and is burdened with so many petty procedural complications, each of which turns on a thorough understanding of the trial record and the complex history of these proceedings, that the Court would be unable in any event to reach the issues presented by the court of appeals' opinion without first devoting itself to the unwonted and tedious task of analyzing and resolving each of these legal and factual trifles.

I. The Court of Appeals' Decision Represents a Correct and Conventional Application of Settled Legal Principles.

It is difficult for respondents to improve upon the court of appeals' cogent statement of the rationale for its decision. Respondents will here simply summarize the reasons why the decision was not only correct but altogether orthodox in its

holdings that the conduct alleged in the petitioner's complaint was not per se illegal and that petitioner failed to establish the factual prerequisites of a finding of illegality under the Rule of Reason.

As the court of appeals noted, the alleged agreement to exclude the plaintiff's advertising from the Leisure World News does not fall within any of the recognized categories of per se offenses. Indeed, at the outset, it appears most closely analogous to certain forms of conduct which have long represented the very paradigms of the type of competitive behavior that is subject to the Rule of Reason, such as covenants ancillary to a sale or lease, exclusive dealing and exclusive distributorships. See, e.g., United States v. Arnold Schwinn & Co., 388 U.S. 365, 376 (1967), overruled on other grounds, Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977); Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327 (1961); Friedman, Inc. v. Thorofare Markets, Inc., 1978-2 CCH Trade Cases ¶62344 at pp. 76075-76 (3d Cir. 1978); Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, 131 (2d Cir. 1978), cert. denied October 30, 1978 (U.S. Sup.Ct., No. 78-347); Hecht v. Pro Football, Inc., supra; United States v. Addyston Pipe & Steel Co., supra at 280-81, 290-91. At worst, as the court of appeals apparently assumed for purposes of the discussion in its

opinion, the type of agreement alleged here is sui generis, and hence could be treated as per se illegal only if it were first affirmatively shown that it would invariably have the sort of "demonstrable economic effect" on competition in the marketplace that would satisfy the "demanding standards" recently formulated by this Court for inclusion in the per se category of previously unexamined types of commercial behavior. Continental TV, Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50, 59 (1977). See also United States v. Topco Assocs., 405 U.S. 596, 607-8 (1971); White Motor Co. v. United States, 372 U.S. 253, 263 (1963); Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958). The court of appeals was clearly right in concluding, upon the basis of its review of the record, that the evidence in this case does not even remotely suggest such a "demonstrable economic effect" on the general level of competition, and that respondents' conduct consequently cannot be condemned under the per se rubric and must instead be subjected to a full-fledged Rule of Reason analysis. As indicated by the citations above, the court of appeals' reasoning in these respects is in perfect accord with the methodology traditionally applied by this Court under section 1, and both its rationale and its conclusion are similarly wholly consistent with the recent decisions of the other courts of appeals, including several decisions involving very similar facts

which this Court has specifically declined to review within the past few months. E.g., Friedman, Inc. v. Thorofare Markets, Inc., supra; Klinger Volkswagen, Inc. v. Chrysler Corp., 583 F.2d 910 (7th Cir. 1978), cert. denied December 4, 1978 (U.S. Sup.Ct., No. 78-644); Oreck Corp. v. Whirlpool Corp., supra; Kestenbaum v. Falstaff Brewing Corp., 575 F.2d 564 (5th Cir. 1978), cert. filed Nov. 14, 1978 (U.S. Sup.Ct., No. 78-800); Sitkin Smelting & Refining Co., Inc. v. FMC Corp., 575 F.2d 440 (3d Cir. 1978), cert. denied October 2, 1978 (U.S. Sup.Ct., No. 78-208).

Petitioner offers no reasoned discussion by way of refutation of this aspect of the court of appeals' analysis, and points to no feature of the court's elucidation of these principles which is in any way novel or in conflict with any apposite decision of this Court or another court of appeals. Rather, he merely attempts, in effect, to shout down the court of appeals' conclusion that this is not a per se case by quoting a string of sonorous pronouncements taken out of context from prior opinions of this Court involving wholly different types of conduct such as tie-ins and concerted refusals by competitors to deal with other firms (Petition, pp. 21-26). The impression apparently sought to be conveyed by this misleading exercise in fragmentary quotation is that this Court has previously enunciated a general rule that whenever

two businessmen agree that one of them will not deal with a third party, a "boycott" has been created which is per se violative of the Sherman Act.

In fact, however, this Court has never adopted such a general rule, and could not have done so without overruling volumes of precedent upholding such presumptively lawful arrangements as exclusive distributorships, vertical customer and territorial limitations, ancillary covenants against competition, distributor and customer substitutions, exclusive dealing and a host of other commercial arrangements to which application of a per se rule has never even been seriously considered. E.g., Continental TV, Inc. v. GTE Sylvania, Inc., supra; United States v. Arnold Schwinn & Co., supra at 376; Tampa Electric Co. v. Nashville Coal Co., supra; Oreck Corp. v. Whirlpool Corp., supra at 131; Hecht v. Pro Football, Inc., supra; United States v. Addyston Pipe & Steel Co., supra at 280-81, 290-91. Rather as the court of appeals correctly noted in rejecting a very similar argument by petitioner in his briefs in the court below, the per se rule against concerted refusals to deal or "boycotts" has been applied only to agreements to which two or more competing firms are parties, a situation which is plainly not presented in this case. E.g., United States v. General Motors Corp., 384 U.S. 127 (1966)

(conspiracy by association of Chevrolet dealers throughout Los Angeles area to induce General Motors to discipline discounters); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (reversing dismissal of complaint alleging that appliance manufacturers had agreed "among themselves" and with plaintiff's competitor not to deal with plaintiff); Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457 (1941) (blacklisting conspiracy among members of large association of garment manufacturers). In so interpreting the scope of the "boycott" prohibition, and in refusing to expand it in the truly revolutionary manner suggested by petitioner, the court of appeals was merely following accepted doctrine, and its decision is, once again, in precise agreement with all of the recent decisions on this issue of other courts of appeals, many of which this Court has already specifically declined to review. Friedman, Inc. v. Thorofare Markets, Inc., supra at p. 76076 n.57; Sitkin Smelting & Refg. Co., Inc. v. FMC Corp., supra at 446-47; H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 245-46 (5th Cir. 1978); Oreck Corp. v. Whirlpool Corp., supra at 132-33; Mutual Fund Investors v. Putnam Mgmnt. Co., 553 F.2d 620, 626 (9th Cir. 1977); Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc., 459 F.2d 138 (6th Cir. 1972). See Continental TV, Inc. v. GTE Sylvania, Inc., supra at 58 n.28;

United States v. Topco Assocs., supra at 608; Klor's, Inc. v. Broadway-Hale Stores, Inc., supra at 212 (1959).

Having thus properly concluded that the alleged agreement in this case was not per se illegal and was instead required to be analyzed under the Rule of Reason, the court of appeals likewise applied the latter method of analysis in an altogether orthodox and correct manner to reach the further conclusion that petitioner had failed to prove the requisite elements of a Rule-of-Reason offense. It is well established by the decisions of this Court, and has been confirmed by a veritable avalanche of recent decisions of the courts of appeals, that conduct which is subject to the Rule of Reason can be found illegal only on the basis of a determination of its likely impact on the level of competition in the market as a whole, not merely its effect on the plaintiff's business, and that the first step in this determination is an identification of the particular market within which such competitive impact is to be assessed. Continental TV, Inc. v. GTE Sylvania, Inc., supra at 49 n. 15; Apex Hosiery Co. v. Leader, 310 U.S. 469, 500-1 (1940); Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918); Friedman, Inc. v. Thorofare Markets, Inc., supra at pp.76076-77; Klinger Volkswagen, Inc. v. Chrysler Corp.,

supra at 914; Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc., 578 F.2d 1256, 1261 (8th Cir. 1978); H & B Eqpt. Co. v. International Harvester Co., supra at 245-46; Northwest Power Products v. Omark Industries, Inc., 576 F.2d 83, 90 (5th Cir. 1978); Kestenbaum v. Falstaff Brewing Corp., supra at 570; Sitkin Smelting & Refining Co., Inc. v. FMC corp., supra at 448; Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 82-83 (3d Cir. 1977), cert. denied 98 S.Ct. 2253 (1978); Mutual Fund Investors v. Putnam Management Co., supra at 627; Knutson v. Daily Review Inc., 548 F.2d 795, 803-4 (9th Cir. 1976), cert. denied 433 U.S. 910 (1976); American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230, 1246-48 (3d Cir. 1975); George R. Whitten, Jr. Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 562 (1st Cir. 1974), cert. denied 421 U.S. 1004 (1974); Chisholm Bros. Farm Equip. Co. v. International Harvester Co., 498 F.2d 1137, 1143 (9th Cir. 1974), cert. denied 419 U.S. 1023 (1974); Elder-Beerman Stores Corp. v. Federated Dept. Stores, Inc., supra at 145. Petitioner apparently concedes the validity of these settled rules, since they are nowhere disputed in the Petition.

Nor does petitioner seriously challenge the court of appeals' employment of these principles to arrive at its ultimate conclusion that petitioner failed to prove his case on these issues

insofar as he neglected to present any evidence whatsoever on the essential questions of relevant market and competitive effect. Petitioner's only effort to contradict the court's assessment of these inadequacies in his case consists of a mere repetition of the wholly unsupported assertion, previously made in his complaint and in his jury argument (CT 1; RT 1219), that the relevant market was the Leisure World housing project in which Crestmark made all of its sales (Petition, p. 29). He fails entirely to deal with the undisputed contrary evidence, relied upon by the court of appeals, to the effect that the residents of that project were perfectly free to, and did, purchase carpets from retail outlets throughout Walnut Creek and the surrounding areas, that Leisure World alone therefore could not conceivably have been the relevant market, and that the impact of the Foundation's advertising policies on the level of competition in the larger suburban marketing area must necessarily have been inconsequential (RT 129-30, 294-302, 677-79, 1030-34, 1057-59; see RT 514-15, 679-80, 688-94).

Thus, with respect to each of its separate elements, the court of appeals' decision represents an utterly mundane and conventional application of traditional antitrust doctrines to a factual record that leaves no room for serious dispute as to the correctness of the court's resolution of

the issues dealt with in its opinion. Petitioner has offered nothing to undercut this characterization of the decision other than unsupported factual assertions and misapplied dicta from plainly inapposite opinions dealing with wholly different types of issues. The conclusion is inescapable that the decision below is plainly correct in its result and conventional in its reasoning, and that it therefore presents none of the sort of novel or important issues which would normally motivate this court to exercise its power of review by writ of certiorari.

II. In Any Event, the Record Presents So Many Other Grounds for Affirmance of the Court of Appeals' Decision and So Many Trivial Procedural Intricacies That This Court Would Be Unlikely to Reach the Substantive Antitrust Issues Presented by the Court of Appeals' Decision Even if It Should Decide to Review This Case.

Even if, contrary to the above demonstration, the court of appeals' decision were found to present any issues of sufficient importance or novelty to merit the attention of this Court, this particular case would be a singularly inappropriate vehicle by which to attempt a resolution of such issues. This is so for two reasons. First, the record presents several alternative grounds for reversal of the judgment of the district court which are at least as substantial as the ground

actually relied upon by the court of appeals, and each of these additional issues would therefore have to be adjudicated before this Court could properly re-examine the questions addressed in the opinion below. Secondly, petitioner has expressly indicated in his petition that he himself will argue that the Court is foreclosed from examining the substantive antitrust issues decided by the court of appeals by reason of certain alleged "concessions" and procedural oversights committed by respondents at various times during the lengthy history of this litigation, and these numerous procedural niceties would therefore also have to be thoroughly explored before the Court could address itself to the merits of the case.

As the court of appeals indicated in its opinion (Petition, Appendix A-6 n.2), petitioner's failure to submit any proof of harm to competition in a properly defined relevant market was only one of several grounds for reversal of the district court's judgment offered by respondents in their briefs in the court below. The Statement of the Case set forth above is sufficient to reveal that several of respondents' additional available arguments for reversal are quite substantial and compelling. In particular, it is submitted (1) that the district court's decision that a prima facie case of conspiracy among related corporations can be established by evidence showing

nothing more than financial interdependence and business consultations on unrelated subjects is at least open to serious dispute (see United States v. Citizens & Southern National Bank, supra at 113-14), and (2) that the jury's conclusion that a $13,000-a-year furniture retailer could somehow lose $41,000 and be forced out of business in two years by difficulties in gaining access to one of several advertising media distributed to a single housing project is at least facially somewhat implausible. Although the court of appeals found it unnecessary to reach these questions once it had decided that the ground discussed in its opinion was sufficient in itself to compel reversal, these issues remain in the case and would have to be addressed by this Court before it could consider setting aside the court of appeals' judgment on the grounds urged by petitioner. Dayton Board of Education v. Brinkman, 433 U.S. 406, 419 (1977); Stern & Gressman, Supreme Court Practice 479 (5th ed. 1978). Given the inherent substantiality of these additional challenges to the trial court's decision, there is obviously a significant likelihood that the Court would be compelled to affirm the court of appeals' judgment of reversal on one of these grounds without ever reaching the purportedly important questions of substantive antitrust law sought to be presented in the Petition. See Stern & Gressman, supra at

490. At all events, the Court would at least be forced to analyze these problems in some detail on their merits before disposing of them and, since all of these additional issues are intensely factual in content, this task would inevitably involve the Court in a violation of its own admonition that "we do not grant certiorari to review evidence and discuss specific facts." United States v. Johnston, 268 U.S. 220, 227 (1924). Accord, Berenyi v. Immigration Director, 385 U.S. 630, 635 (1967).

The other category of distracting side-issues which will obstruct consideration of the matters discussed in the court of appeals' opinion are the procedural questions which petitioner himself apparently intends to inject into this proceeding in the event the Court agrees to hear the case. Four of the nine "Questions Presented" set forth in the Petition involve contentions that the substantive antitrust issues resolved in the court of appeals' opinion should never have been addressed because consideration of these matters is barred by various purported procedural rules (Petition, p. 4; See also Petition, pp. 33-36). All of these technical arguments have previously been raised and rejected in one or another of the appeals in the courts below, and most of them were also the subject of petitioner's earlier petition for certiorari, which was denied by this Court following

the second appeal. See 585 F.2d at 385-86; 533 F.2d at 455; Petition for Certiorari in No. 76-3, October Term, 1975, denied by order dated October 4, 1976. Petitioner has nevertheless clearly indicated in his petition (at pages 33-36) that these technicalities will occupy a central position in his argument to this Court in the event the Court now agrees to hear the case. Since these issues concededly would have to be disposed of before the merits of the antitrust issues could be examined, the Court would unavoidably become enmeshed in all of the picayune procedural details of this complex and lengthy litigation. And since petitioner does not even contend that any of these problems possesses any legal significance extending beyond the confines of this unique case, the inevitability of the Court's entanglement in such matters is another strong consideration militating against a decision to review the case.

Thus, even if the court of appeals' decision were perceived as presenting anything other than a garden-variety application of accepted antitrust doctrines, this case would still not provide the proper setting in which to attempt to resolve any of the substantive legal issues that might be presented by that decision. For, as respondents have just demonstrated, this Court could not even consider those issues without first disposing of several alleged procedural obstacles and several

alternative grounds for affirmance of the court of appeals' decision, none of which is of any general importance, but all of which would require the Court to expend substantial time and effort in the unaccustomed chores of factual adjudication and application of accepted procedural rules to the tangled chronology of this particular litigation.

CONCLUSION

It has here been demonstrated that the decision below represents nothing more than an application of well established principles of antitrust law to the facts of a particular case. Moreover, even if this Court were nevertheless inclined to review the decision, it would be unable to reach the substantive issues presented in the Petition without first addressing the numerous trivial factual and procedural difficulties which clutter the record in this extended proceeding. For both these reasons, the petition for a writ of certiorari should be denied.

Dated: February 2, 1979.

Respectfully submitted,

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